85-1439

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANKLIN AND MARSHALL COLLEGE,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BENJAMIN W. HEINEMAN, JR.*
CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

GEORGE C. WERNER, JR.
BARLEY, SNYDER, COOPER
& BARBER
126 East King Street
Lancaster, PA 17602
(717) 299-5201
Counsel for Petitioner

* Counsel of Record

February 27, 1986

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals erred when it held, in direct conflict with the rulings of two other courts of appeals, that all confidential peer review records relating to every faculty tenure decision made by a private college during a four-year period enjoy no First Amendment protection from a subpoena issued by the Equal Employment Opportunity Commission in an employment discrimination investigation conducted under Title VII of the Civil Rights Act of 1964.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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Franklin and Marshall College, through its counsel, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 775 F.2d 110. The order of the district court (App., *infra*, 29a) is not reported. The determination by the EEOC not to revoke or modify its subpoena (App., *infra*, 30a-37a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1985. A petition for rehearing was denied (App., *infra*, 26a-28a) on November 29, 1985. The jur-

isdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . . .

42 U.S.C. § 2000e-8(a) provides in pertinent part:

> In connection with any investigation of a charge filed under Section 2000e-5 of this title, the [Equal Employment Opportunity] Commission . . . shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

STATEMENT

1. Petitioner Franklin and Marshall College is a private, four-year liberal arts institution located in Lancaster, Pennsylvania. It was founded in 1787 and currently has a co-educational student body of approximately 1,900.

Petitioner has only 134 faculty members. The average department in the College has only five faculty members. In this setting any decision by petitioner whether or not to grant a member of the faculty tenure, which has long-term implications for both the institution and the individual, is of obvious importance to the College. Accordingly, the standards for tenure at Franklin and Marshall are strict. Approximately one-third of those considered for tenure do not obtain it, even though their achievements are otherwise very respectable. C.A. App. 83a.

On July 1, 1977, Gerard Montbertrand was hired as an untenured, assistant professor in petitioner's French Department. App., *infra*, 2a. In 1981, Montbertrand was considered for tenure on the recommendation of the French Department. The Professional Standards Committee, which includes the Dean of the College and five faculty-elected members and which performs a tenure review of all regular faculty members at the College, recommended against awarding tenure to Montbertrand. That recommendation was adopted by both the Dean and the President of the College. *Id.* at 2a-3a.

After the initial adverse decision, Montbertrand requested petitioner's President to inform him of the College's reason for denying him tenure. In response, the President wrote a letter to Montbertrand informing him that according to the minutes of the Professional Standards Committee meeting regarding Montbertrand " '[t]enure was not recommended because deficiencies in the areas of scholarship and general contributions were not sufficiently offset by performance in other areas.' " App., *infra*, 3a.

Montbertrand then requested and received reconsideration of the tenure decision by the Professional Standards Committee. Upon reconsideration, the Committee reaffirmed its earlier recommendation which was again accepted by petitioner's Dean and President. App., *infra*, 3a.

In June 1981, Montbertrand filed a charge with the EEOC, alleging that petitioner had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), by refusing discriminatorily to grant him tenure because of his national origin, which was French. App., *infra*, 3a.[1] As part of its investigation, the EEOC issued a

[1] Prior to filing a charge with the EEOC, Montbertrand petitioned the College's Grievance Committee, claiming that the adverse tenure decision had violated his rights to academic freedom and academic

subpoena *duces tecum* requiring the following from petitioner (*id.* at 3a-4a; emphasis added):

1. For the individual *granted* or *denied* tenure during the period November 7, 1977 to the present, provide the following records or documents:
   a) Tenure Recommendation forms,
   b) COTE form results [analyzing student evaluation],
   c) Grade surveys,
   d) Enrollment data,
   e) Annual evaluation forms, including third year review,
   f) Governance evaluation forms,
   g) Publication information and evaluations by outside experts,
   h) Letters of reference,
   i) Information regarding academic advising,
   j) All notes, letters, memoranda or other documents considered during each tenure case, including curricula vitae,
   k) Recommendations of Professional Standards Committee in each tenure case, and
   l) Actions taken by the President in each tenure case.
2. Produce and make available for inspection all notes, letters, memoranda or other documents generated by each Professional Standards Committee member, as part of his/her involvement in Charging Party's original tenure case and subsequent reconsideration.
3. Produce and make available for inspection the the minutes of *each Professional Standards Committee meeting* in which *each* tenure case, during the period November 1977 to the present, was discussed.[2]

due process. The Grievance Committee dismissed the claim finding no merit to Montbertrand's allegations. App., *infra*, 3a.

In response to this request, petitioner offered to turn over all the recommendations of the Professional Standards Committee and the actions taken by the President in all tenure cases since 1977. Petitioner previously had permitted the EEOC to inspect, but not copy the minutes of the Professional Standards Committee meeting concerning the Montbertrand tenure decision. App., *infra*, 4a-5a. In addition, it offered all documents that did not involve peer review materials for all of the College's tenure candidates since 1977. With respect to the confidential peer review documents used by the Committee in assessing all such candidates, petitioner argued that disclosure to the EEOC would intrude upon petitioner's right to academic freedom. *Id.* at 5a, 36a.

When the EEOC insisted upon full compliance with its subpoena, petitioner filed an administrative application to revoke or modify the subpoena. The District Director of the EEOC denied the request. App., *infra*, 30a-37a. The District Director pointed out that the Commission's investigatory authority is extremely broad and that all of the materials requested were "relevant" within the broad meaning of that term in 42 U.S.C. § 2000e-8(a). App., *infra*, 32a-33a. With respect to petitioner's claim that its peer review documents should be privileged, the agency asserted that "[i]t is a generally accepted principle of law that where confidential information relates to a college's justification for a challenged decision, the Plaintiff's right to a fair opportunity to present his claim must prevail over any general principles of academic confidentiality." (*id.* at 36a).

[2] The only limitation on the request was that petitioner could delete the names and identifying characteristics of those reviewing the tenure candidate's qualifications. App., *infra*, 4a. But in a school as small as Franklin and Marshall, such deletions are patently inadequate to protect confidentiality.

2. After petitioner declined to comply voluntarily with the EEOC's subpoena, the Commission filed the instant lawsuit in the United States District Court for the Eastern District of Pennsylvania pursuant to Section 710 of Title VII, 42 U.S.C. § 2000e-9, seeking a judicial order enforcing the subpoena. In seeking an Order to Show Cause, the EEOC simply alleged that all of the information requested was relevant to its investigation (C.A. App. 15a); the Commission made no effort to show any particular need for any specific items subpoenaed.

Petitioner opposed the EEOC's application and filed the affidavit of Bradley R. Dewey, the Dean of the College, which, *inter alia*, described the tenure process at the College, discussed the reasons for Montbertrand's denial of tenure and compared Montbertrand's record of academic achievement and participation in the governance of the College with those of the candidates who received tenure. Dean Dewey characterized Montbertrand's scholarship record as "weak" compared with other candidates (C.A. App. 85a) and his governance record "to be unsatisfactory on the basis of quantity and quality of participation." C.A. App. 86a. The affidavit contained specific charts to demonstrate these propositions.[3] Finally, Dean Dewey explained the importance to petitioner specifically and to the academic community more generally of confidentiality in the peer review process. C. A. App. 81a-97a.

The district court, in a one-sentence order and without any legal analysis, ordered petitioner to comply with the EEOC's subpoena *duces tecum*. App., *infra*, 29a. The

[3] Dean Dewey also supplied the district court with comparative data regarding petitioner's tenure decisions of candidates who were of foreign origin compared with American nationals. Since 1975, "86% of foreign origin faculty received tenure . . . compared with a 68% tenure rate for American nationals during the same time period." C.A. App. 94a.

court did authorize petitioner to "omit the names and identifying data of other professors" in the materials to be produced to the Commission. *Ibid.* See note 2, *supra*.

A divided panel of the court of appeals affirmed. App., *infra*, 1a-25a. In holding that all of the documents requested by the EEOC had to be disclosed, the majority expressly stated that it "decline[d] to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach" for confidential peer review materials. *Id.* at 8a. Although the majority recognized that confidentiality in peer review is "important" to the tenure process, which is in turn a critical element of academic freedom protected by the First Amendment (*ibid.*), the court of appeals nevertheless applied what it called the broad "relevance" standard for government investigations to petitioner's documents and afforded them no additional protection. *Id.* at 11a. Finding that petitioner's peer review materials for all tenure candidates since 1977 are "part of an appropriate comparative base" and therefore were "relevant" to the EEOC's investigation, the court ordered all of the requested documents to be produced. *Id.* at 14a.

Chief Judge Aldisert dissented. App., *infra*, 15a-25a. He pointed out initially that petitioner "has provided or agreed to provide a considerable amount of data" to the EEOC. *Id.* at 17a. He then analyzed the special qualities of academic institutions and the First Amendment's protection for academic freedom generally and the tenure process in particular. After analyzing Congress' intent in Title VII, he concluded that Congress did not intend "a massive, uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process of innocent third parties." *Id.* at 20a. Instead, he reasoned that Congress' intent would be served by balancing the EEOC's right to reasonable discovery and petitioner's legitimate interest in the confidentiality of its

tenure process. Under this standard, he would have required the EEOC to make at least some showing that Montbertrand's discrimination claim had substance before allowing the EEOC to obtain records and documents covering *all other* faculty members who had been granted or denied tenure since 1977. *Id.* at 24a.

The court of appeals denied rehearing *en banc*. App., *infra*, 26a.[4] Judge Adams filed a separate statement (*id.* at 27a-28a). He described the panel holding as allowing "a broad sweep of files revealing the internal debate over tenure votes, without any demonstration of special need." *Id.* at 27a. Relying upon the fact that "two other circuit courts of appeals have fashioned contrasting approaches to that adopted by the" Third Circuit and upon "the importance of the issue," Judge Adams argued that the court should have reheard the issue *en banc*. *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The Third Circuit has decided an issue of recurring and fundamental importance to every academic institution in a way that directly conflicts with decisions of two other courts of appeals. At present, there are three different legal standards employed in the courts of appeals for deciding when district courts may order production of confidential peer review materials relating to tenure decisions. In the Seventh Circuit, a party alleging possible employment discrimination must make a substantial showing of particularized need for confidential tenure materials; in the Second Circuit, such a party would have to show that the need for disclosure of confidential tenure materials outweighed the interest of the academic institution in the confidentiality of its tenure process; and in the Third Circuit, under the rule of this case, such a party need only show that confidential tenure

[4] Judges Hunter and Garth merely noted their votes to grant rehearing. App., *infra*, 26a.

materials are loosely relevant to the claim of discrimination; confidentiality does not enter into the judicial balance. Review of the decision below by this Court is therefore critical in order to establish a uniform federal rule and to bring certainty to an area of fundamental importance to the nation's colleges and universities.

Second, the court of appeals erred by holding that confidential peer review materials, which are clearly protected by the First Amendment, are nevertheless discoverable by the federal government based on no more than an assertion that materials subpoenaed pursuant to an investigation are loosely "relevant" to a possible Title VII claim. The decision conflicts with prior decisions of this Court requiring the government in other areas to make a more substantial showing of need before it is allowed to investigate activities protected by the First Amendment. The court of appeals' reasoning is also inconsistent with this Court's traditional standards of statutory interpretation when a statute as applied will intrude upon First Amendment rights. Review of the decision below by this Court is necessary to correct these manifest errors.

1. It is beyond dispute that there is a conflict in the circuits on an important issue of federal law and that, if this case had arisen in either the Seventh Circuit or the Second Circuit, the outcome would have been significantly different. In *EEOC* v. *University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983), the court of appeals analyzed carefully the conflicting interests of academic institutions in maintaining the confidentiality of the peer review process on the one hand and of the EEOC in obtaining evidence of possible unlawful discrimination on the other. The court of appeals resolved the balance by recognizing "a qualified academic freedom privilege protecting academic institutions . . . in the context of challenges to college or university tenure decisions." 715 F.2d at 337. In implementing this privilege, the court required the EEOC "to make a substantial showing of 'particularized need' for relevant information. . . ." *Id.*

at 338. Compare *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 567 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 222 (1979); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959).

In this case the EEOC has never attempted to make a showing of need for any of the information requested. At a minimum such a showing would require the EEOC to evaluate the information already made available to it by petitioner and then to demonstrate why a broad intrusion into the peer review materials relating to all tenure decisions during a four-year period is still warranted as anything other than a bald assertion of the Commission's investigatory authority. Petitioner already has allowed the EEOC to inspect the minutes of the Professional Standards Committee's tenure recommendation meeting regarding Montbertrand's academic record and has given the EEOC all non-peer review materials concerning the other candidates who were considered for tenure in 1981. The EEOC has never claimed that any of this information reveals the slightest proof of discrimination. In addition, petitioner offered to provide the EEOC with similar non-peer review materials for all other candidates considered for tenure since 1977 and with aggregate data concerning tenure decisions for all foreign nationals on petitioner's faculty. Under these circumstances, the Commission has failed to satisfy the Seventh Circuit's standards for overcoming petitioner's qualified privilege in its confidential peer review materials relating to tenure decisions. Therefore, in sharp contrast to the decision below, the EEOC's subpoena would not have been enforced if the case had arisen in that circuit.

In *Gray* v. *Board of Higher Education*, 692 F.2d 901 (2d Cir. 1982), the Second Circuit considered the issue of peer review confidentiality in the context of a discovery request in a suit under 42 U.S.C. § 1981, alleging that a black educator was denied tenure because of his race. Pursuant to Fed. R. Civ. P. 26, the plaintiff sought to

learn how two members of the Personnel and Budget Committee of the college had voted when the Committee denied him tenure without providing any statement of reasons.

The court held that the resolution of the discovery issue depended on balancing the individual plaintiff's need to obtain the requested information against the academic institution's legitimate interest in protecting the confidentiality of its peer review process for making sensitive tenure decisions. 692 F.2d at 903. Although the court in that case upheld the plaintiff's request, its legal reasoning clearly would have required the Third Circuit to quash the subpoena in this case.

The Second Circuit in *Gray* adopted a different approach than that used by the Seventh Circuit in the *Notre Dame* case. The court in *Gray* used a balancing test for determining when confidential tenure information must be disclosed. 692 F.2d at 905. Under its rule a court should weigh the party's need for particular information against the college's interest in the confidentiality of its tenure materials. In applying the balancing test to the facts in *Gray*, the court of appeals found that the limited information requested should be produced because plaintiff had to prove discriminatory intent and the college had failed to supply him with any statement of reasons for his denial of tenure. 692 F.2d at 905-906. The court emphasized that the intrusion into the peer review process was minimal. In that case, plaintiff sought only information about how two members of the Committee had voted with respect to plaintiff, and the Second Circuit clearly indicated that even this limited information would not have been discoverable if the college had given him a statement of reasons for his denial of tenure. 692 F.2d at 906-908.

In this case, by contrast, the EEOC has requested and the Third Circuit has ordered disclosed not only Montbertrand's peer review materials but also all peer review documents for all tenure candidates for the entire col-

lege for the period 1977-81. Moreover, Montbertrand did receive a statement of reasons for his denial of tenure; and the EEOC already has received substantial quantities of information relevant to both the issue of discriminatory intent and disparate impact.[5] Under the Second Circuit's balancing of the relevant interests implicated by the EEOC's subpoena, the EEOC's request should have been denied. Compare *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir. 1977) (balancing college's interest in confidentiality against plaintiff's need for peer review materials of all faculty members; held disclosure not required). In any event, the Third Circuit explicitly refused to adopt a balancing approach. App., *infra*, 8a. The decision of the Third Circuit, therefore, conflicts directly with that of the Second Circuit.[6]

The Third Circuit itself recognized that its decision placed it in conflict with two other circuits. App., *infra*, 8a; page 7, *supra*. Moreover, it is a conflict which is relevant to every Title VII claim of discrimination in a tenure decision. Such a substantial federal question clearly warrants resolution by this Court.

2. The Third Circuit's holding that Title VII requires petitioner to disclose all confidential materials relating to all tenure decisions made during a four-year period

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[5] Under Title VII, the EEOC in this case would not have to prove intent. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-433 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

[6] Although the court of appeals in this case paid lip service to petitioner's interest in the confidentiality of its peer review process for deciding tenure, it accorded that interest absolutely no weight in deciding whether to order the information revealed to the EEOC. In essence, the court's decision is in accord with the decision of the Eleventh Circuit in *In re Dinnan*, 661 F.2d 426 (1981), cert. denied, 457 U.S. 1106 (1982). When certiorari was denied in *Dinnan*, there was no inter-circuit conflict because neither *Gray* nor *Notre Dame* had been decided. After this Court denied certiorari in *Dinnan*, the Second Circuit clearly expressed its disagreement with the Eleventh Circuit's approach: "we think the opinion [in *Dinnan*] accords too little weight to the concerns for confidentiality in the academic tenure decision-making process." 692 F.2d at 904-905 n.6.

under a loose relevance standard is in conflict with decisions of this Court because it gives no weight to the First Amendment stature of academic freedom in general and the tenure review process in particular.

(a) This Court has previously held that this nation "is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.). Justice Frankfurter defined the key elements of constitutionally protected academic freedom when he listed the "'four essential freedoms' of a university" in his concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (emphasis added), and the first freedom he cited was the right to determine "*who may teach.*" See *Regents of the University of Michigan* v. *Ewing*, —— U.S. ——, 106 S. Ct. 507, 514 & n.12 (1985); *Wieman* v. *Updegraff*, 344 U.S. 183, 197 (1952). Thus, any governmental investigation that will significantly affect an academic institution's exercise of this basic freedom will require careful judicial scrutiny.

The tenure decision is the most important part of every college and university's decision about who shall teach. The Dean at Franklin and Marshall described the importance of the tenure decision this way:

> Barring dramatic events, the award of tenure is the award of a lifetime contract. If an error is made, several generations of students must bear the brunt of that error. Tenure decisions carry great long-range consequences for the quality of education a college can offer.

C. A. App. 96a. See L. Joughin, Academic Freedom and Tenure 5-6 (1967); American Ass'n. of University Pro-

fessors, Statement of Principles on Academic Freedom and Tenure (1940); cf. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Because of the importance of the tenure decision to the ongoing quality of an academic institution, peer review of the suitability of each candidate for tenure is critical.

> [T]he peer review process is essential to the very lifeblood and heartbeat of academic excellence. . . . [It is] the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications.

EEOC v. *University of Notre Dame du Lac*, 715 F.2d at 336. See *Kunda* v. *Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980).

The peer review process functions because the participants offer candid assessments of each candidate in reliance upon a long-standing tradition of confidentiality. The American Council of Education, in its Guidelines for Colleges and Universities, No. 7 (Dec. 1981), explains that "[m]ost educators believe that confidentiality is crucial to [the peer review] process." See Report of the Comm. on Confidentiality in Matters of Faculty Reappointment, U. Chi. Rec. 165 (May 22, 1979). Confidentiality is as important to academic peer review as it is to other activities where this Court has upheld claims of confidentiality, such as petit jury deliberations, *Clark* v. *United States*, 289 U.S. 1, 13 (1933); governmental deliberations, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975), *United States* v. *Nixon*, 418 U.S. 683, 705 (1974) and grand jury investigations, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. at 400. Cf. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (disclosure of contributors to minor political party unconstitutional).

(b) The court of appeals' first fundamental error was its failure to recognize the constraint that the First Amendment imposes upon the proper scope of any governmental investigation. It is clearly not sufficient to protect petitioner's academic freedom to permit the EEOC to pursue its extremely broad investigation under the loose relevance standard employed by the court below. This Court has held in other contexts that before the government pursues an investigation into First Amendment protected activities it must demonstrate more than the loose relevance of the information to a legitimate governmental purpose. Ordinarily, the government must show that the protected materials are substantially related to the government's purpose and that needed information cannot be obtained in any other manner. See, *e.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. at 254; *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546, 557 (1963). *Cf. Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) (need to balance First Amendment and governmental interests in context of particular case). But, as we have already shown, the EEOC made no showing that all confidential tenure materials for a four-year period were substantially related to its investigation of Montbertrand's charge in light of the extensive information already available to the Commission. Nor, of course, did the court of appeals even attempt to balance petitioner's First Amendment interests in confidentiality against the needs of the EEOC.

The court of appeals committed a second error by failing to interpret Title VII so as to avoid creating a constitutional issue. Under well-settled principles of statutory construction, the court of appeals should have assumed that Congress would not intend that its statute intrude into a protected First Amendment area, unless Congress clearly expressed that intent. See, *e.g.*, *Lowe* v. *SEC*, —— U.S. ——, 105 S. Ct. 2557, 2563 & n.24 (1985); *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979); *Machinists* v. *Street*, 367 U.S. 740, 749 (1961).

See also *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

The court of appeals, however, ignored this Court's fundamental rule of construction that federal statutes should be interpreted in a manner that will avoid First Amendment issues. The court examined Title VII for evidence that Congress did *not* intend to permit the EEOC to intrude into this area of constitutionally-protected academic freedom. Finding nothing in the language or legislative history of Title VII that so restricted the EEOC's authority, the court concluded that petitioner should be treated "the same as any other employer." App., *infra*, 21a (Aldisert, C.J., dissenting). See *EEOC* v. *Shell Oil Co.*, —— U.S. ——, 104 S. Ct. 1621 (1984). The court of appeals should have examined the language and legislative history of Title VII for proof that Congress expressly did intend to give the EEOC virtually unlimited authority to intrude into the sensitive area of confidential academic peer review. But it is clear that Congress did not express any such specific intent and the court of appeals was therefore clearly wrong in refusing to give *any* protection to petitioner's tenure deliberations against an administrative subpoena issued in a Title VII investigation. Because the decision plainly conflicts with this Court's clear teachings regarding the proper scope of governmental investigations into First Amendment protected areas and the correct method of interpreting a federal statute in light of a serious constitutional issue, review by this Court is warranted.

* * * * *

The ruling of the court of appeals will clearly inhibit frank and unrestrained discussion within the academic community on tenure decisions and will thus impair the quality of those discussions. Any discrimination complaint by a disgruntled candidate will automatically require disclosure of all confidential tenure deliberations and recommendations for the entire college regardless of the comparative need of the EEOC for the information

and the college for confidentiality.[7] Such a result will, in turn, have widespread adverse effects on the fundamental purposes of the academic world to conduct unfettered research and to freely disseminate knowledge. App., *infra*, 28a (Adams, J.). Only this Court can resolve the conflicting approaches of the courts of appeals on this issue and only this Court can ensure that every academic institution's legitimate First Amendment activities are protected from overly broad federal investigations by more than the loose relevance standard applied by the Third Circuit in this case. The stakes are too large and the interests too important for the applicability of the First Amendment's academic freedom protections to turn on the fortuity of which part of the nation the academic institutions are located.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BENJAMIN W. HEINEMAN, JR.*
CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

GEORGE C. WERNER, JR.
BARLEY, SNYDER, COOPER & BARBER
126 East King Street
Lancaster, PA 17602
(717) 299-5201

Counsel for Petitioner

* Counsel of Record

February 27, 1986

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[7] The Third Circuit's decision has already been followed by at least one district court in another circuit. See *Rollins* v. *Farris*, 39 F.E.P. Cases 1102, 1104-1105 (E.D. Ark. 1985).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee

vs.

FRANKLIN AND MARSHALL COLLEGE,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Misc. No. 84-0675)

Argued August 5, 1985

Before: ALDISERT, *Chief Judge*,
STAPLETON and MANSMANN,
Circuit Judges

(Filed OCTOBER 21, 1985)

OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This court must decide whether the district court erred in requiring Franklin and Marshall College ("College") to comply with a subpoena duces tecum issued by the Equal Employment Opportunity Commission ("EEOC") which compels disclosure of confidential peer review material. The College and the *amici curiae* urge adoption of a qualified academic peer review privilege which, if properly applied to the facts at issue, would protect, they argue, the confidential material from the agency's subpoena. After careful consideration of all matters raised by brief and in oral arguments, we decline to adopt the proferred qualified academic peer review privilege. Because we find that the material sought by the EEOC is relevant to its investigation, the order compelling compliance with the subpoena will be affirmed.

I.

This subpoena enforcement action arises out of the EEOC's investigation of a charge of discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, filed by Gerard Montbertrand, a former assistant professor who was denied tenure, against the College. Professor Montbertrand was hired on July 1, 1977 as a member of the College's French Department. He was assigned primarily upper level French courses, although the College asserts that, due to the Department's limited size (4 professors), he was expected to be able to teach lower level French language courses. In the Fall of 1980, Professor Montbertrand was reviewed for tenure by the Professional Standards Committee. The committee is composed of the Dean of the College and five faculty-elected members. It performs all tenure reviews at the College. The Chairperson of the French and Italian Departments did inform the committee of evaluations recommending Professor Montbertrand for tenure. The Professional Standards Committee, however, recommended against awarding tenure to Montbertrand. That recommendation was accepted by the Dean and by the President of the College.

After Professor Montbertrand was informed of the denial of his tenure, he requested a written statement of the reasons. In a letter from the President of the College dated January 31, 1981, Montbertrand was informed that the minutes of the Professional Standards Committee stated that "[t]enure was not recommended because deficiencies in the areas of scholarship and general contributions were not sufficiently offset by performance in other areas." Appendix. at 101a.

Professor Montbertrand requested reconsideration of the tenure decision. The Professional Standards Committee reconsidered its decision in light of additional information submitted by Montbertrand and by others. The committee reaffirmed its earlier recommendation to deny tenure. That recommendation was again accepted by the Dean and by the President of the College.

Professor Montbertrand petitioned the College's Grievance Committee for review of the tenure decision, alleging denial of academic freedom and academic due process. After reviewing the allegations and finding no merit in the claims, the Grievance Committee dismissed the petition in May of 1981.

In June of 1981, Professor Montbertrand filed a charge of discrimination with the EEOC alleging discrimination based on his French national origin. In the course of its investigation, the EEOC issued the subpoena duces tecum which is the subject of this action. The subpoena required that the College:

1. For the individual *granted* or *denied* tenure during the period November 7, 1977 to the present, provide the following records or documents:
    a) Tenure Recommendation forms,
    b) COTE form results [analyzing student evaluation],

c) Grade surveys,

d) Enrollment data,

e) Annual evaluation forms, including third year review,

f) Governance evaluation forms,

g) Publication information and evaluations by outside experts,

h) Letters of reference,

i) Information regarding academic advising,

j) All notes, letters, memoranda or other documents considered during each tenure case, including curricula vitae,

k) Recommendations of Professional Standards Committee in each tenure case, and

l) Actions taken by the President in each tenure case.

2. Produce and make available for inspection all notes, letters, memoranda or other documents generated by each Professional Standards Committee member, as part of his/her involvement in Charging Party's original tenure case and subsequent reconsideration.

3. Produce and make available for inspection the minutes of each Professional Standards Committee meeting in which each tenure case, during the period November 1977 to the present, was discussed.

Appendix, at 32a-33a. The EEOC offered to accept the material with names and identifying characteristics deleted. *Id.* at 129a.

Prior to the issuance of the subpoena, the College had permitted the EEOC to review, but not copy, the minutes of all Professional Standards Committee meetings

regarding the Montbertrand decision. In response to the subpoena, the College agreed to provide the EEOC with data regarding the performance of each tenure candidate considered from 1977 to the date of the subpoena as well as the disposition of each case and the statement of reasons from the Professional Standards Committee (subpoena requests I(k) & I(l)). The College also offered to comply with the portions of the subpoena seeking documents not considered confidential peer review material such as COTE scores, grade surveys and enrollment data (subpoena requests 1(b), 1(c) & 1(d)).

At issue before us now is the College's refusal to provide the bulk of the material sought, including tenure recommendation forms prepared by faculty members, annual evaluations (except those prepared by the Dean), letters of reference, evaluations of publications by outside experts, and all notes, letters, memoranda or other documents considered during each tenure decision (subpoena requests 1(a), 1(e), 1(g), 1(h), 1(j), 2 & 3).[1]

When the EEOC pressed for full compliance with the subpoena, the College pursued administrative relief by filing with the agency a Petition to Revoke or Modify the Subpoena. After the EEOC denied the petition on August 18, 1983, the College appealed to the EEOC to alter its decision. The EEOC denied that appeal on June 29, 1984. The College informed the EEOC on July 26, 1984 that it would not fully comply with the subpoena.

The EEOC then initiated the instant litigation by filing an Application for Order to Show Cause Why a Subpoena Should Not Be Enforced in the district court. On November 9, 1984, the court filed an Order compelling the College to comply with subpoena requests 1(e), 1(h),

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[1] The College apparently does not possess governance evaluation forms and information regarding academic advising (subpoena requests 1(f) & 1(i)). *See* Appendix at 62a.

1(j), 2 and 3 but, with the EEOC's concurrence, allowing the College to omit names and identifying data.

The College subsequently filed this appeal and moved the district court for a stay pending appeal. On December 28, 1984, the district court filed an order staying enforcement of its order compelling compliance with the subpoena pending disposition of the appeal. We granted Gettysburg College and Dickinson College leave to file an *amici curiae* brief. We also permitted Allegheny College, Bucknell University, Chatham Ccllege, Haverford College, Lafayette College and Lehigh University to participate as *amici curiae* and to adopt the *amici curiae* brief previously filed.

II.

On appeal, the appellant and the *amici curiae* urge this court to reverse the district court's order compelling the College's compliance with the subpoena duces tecum issued by the appellee. The appellant contends that "the quality of a college, and in a broader sense, academic freedom, which has a constitutional dimension, is inextricably intertwined with a confidential peer review process." Brief of Appellant, at 14. For this reason, the appellant argues, "disclosure of peer review material should be compelled only when facts and circumstances give rise to a sufficient inference that some impermissible consideration played a role in the tenure decision." *Id.* at 15. The appellant suggests that the court should adopt a qualified academic peer review privilege which would prevent disclosure of confidential peer review material absent a showing of an inference of discrimination. Adoption of such a privilege, argues the appellant, strikes the proper balance between the needs of the EEOC in its investigation and the College's interest in maintaining academic freedom.

The appellant and the *amici curiae* are not the first to advocate the privilege. Several United States Courts of Appeals have addressed the issue and have reached differ-

ing results. The United States Court of Appeals for the Seventh Circuit has recognized a qualified privilege requiring particularized need before ordering disclosure of the names and identities of persons responsible for materials generated in the peer review tenure process. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337-38 (7th Cir. 1983). The Court of Appeals noted the unusual posture of the case, stating that "[t]his case is unique in that Notre Dame is voluntarily producing redacted files to the EEOC." *Id.* at 337 n.4. The court did suggest that in a case where disclosure of the confidential material was in controversy, "there must be substance to the charging party's claim and thorough discovery conducted before even redacted files are made available." *Id.*

The United States Court of Appeals for the Second Circuit adopted a balancing approach, but not a rule of privilege, in a discrimination action brought under 42 U.S.C. §§ 1981, 1983 & 1985. *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901, 904-05 (2d Cir. 1982). The Court of Appeals applied its balancing test and decided, on the particular facts of the case, to reverse the district court's order denying the plaintiffs' motion to compel discovery of the votes of two members of the tenure committee. While the case did not involve a subpoena issued by the EEOC pursuant to Title VII, the analysis of the *Gray* court may be helpful nonetheless in the context of a Title VII investigation. *Cf. EEOC v. University of Notre Dame Du Lac*, 715 F.2d at 337 & n.3.

Unlike the Seventh and Second Circuits, the United States Court of Appeals for the Fifth Circuit expressly rejected a proposed privilege based on academic freedom. *In re Dinnan*, 661 F.2d 426, 427 (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982). The *Dinnan* court held that a member of the College Education Promotion Review Committee could not refuse to reveal his vote on the application for promotion in question. *Id.*

We decline to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach. It is true that the concept of "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., announcing Court's judgment and expressing his views of case). "'[T]he four essential freedoms' of a university" have been said to include the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it should be taught, and who may be admitted to study." *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result) (citation omitted). Central to the determination of "who may teach," or who will receive tenure, has been the system of peer review by confidential evaluations and recommendations of tenured faculty. "[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977) (citation omitted) (quoted in *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980)).

We recognize that confidentiality in the peer review system plays an important role in obtaining candid, honest assessments of the candidates under review and, thus, has been essential to the determination of "who may teach," especially in such close educational settings of the size of appellant where tenure applicants and tenure decision-makers continue to work side-by-side. Appellant and *amici curiae* have forcefully argued the increased importance of confidentiality based upon the relatively small size of the teaching staffs and administrative personnel. They cite embarrassment, confrontational situations and the fear of less than honest evaluations as likely results of a lack of confidentiality.

In assessing the importance of the academic freedom principles at issue, our starting point is an examination of Congress' intent in enacting and amending Title VII legislation. We begin with Congress' manifest refusal to exempt academic institutions from Title VII's prohibition against discrimination. As the Supreme Court of the United States has reminded us, "Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (citation omitted). Congress clearly intended that this goal be no less important in the academic setting than in industry. In 1972, Congress deleted the exemption for institutions of higher education which was contained in the original legislation. As this court has stated previously, "[t]he legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements." *Kunda*, 621 F.2d at 550. The House Report from the Education and Labor Committee, reporting on several proposed amendments including the elimination of the immunity under Title VII previously extended to academic institutions, states:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees—primarily teachers—from Title VII coverage. . . . The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fu[t]ure development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.

H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. 19-20, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137,

2155. In *Kunda v. Muhlenberg College*, this court concluded from the legislative history of Title VII and its amendments that, notwithstanding principles of academic freedom, tenure decisions fall within the intended scope of the Act. 621 F.2d 532, 547-48 (3d Cir. 1980). "Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions." *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979).

We look further for evidence that Congress intended that special treatment be accorded academic institutions *under investigation* for discrimination and find none. No inference can be drawn from the legislative history of Title VII, as amended, that Congress intended or would permit academic institutions to bar the EEOC's access to material relevant to an investigation. A privilege or Second Circuit balancing approach which permits colleges and universities to avoid a thorough investigation would allow the institutions to hide evidence of discrimination behind a wall of secrecy.

We are not unmindful of nor insensitive to the importance of confidentiality in the peer review process, especially for institutions of the size and character of the appellant college and the *amici curiae*. We recognize that permitting disclosure to the EEOC of confidential peer review material may perhaps burden the tenure review process in our nation's universities and colleges. In the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, however, we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluation decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality.

III.

Appellant and *amici* urge an interpretation of the discovery rules which would require an initial showing by the EEOC of some merit to the discrimination charge before disclosure of confidential material could be ordered. In this regard, appellant argues that, despite the preliminary stage of this matter (i.e., prior to any litigation having been filed), the EEOC should be held to a higher discovery standard than parties would be once litigation has commenced. Further, appellant implicitly argues that discovery should be limited to the pretext issue and that any evidence that its legitimate reason for tenure denial is pretext (though denied) can be drawn from the non-confidential material and summary charts which the College is willing to release to the EEOC.

We reject this concept because it is inconsistent with the language, history and purpose of Title VII and with Congress' grant of investigatory authority to the EEOC. Congress has made clear that the scope of the EEOC's subpoena power is limited by the standard of relevance. *See* 42 U.S.C. § 2000e-8(a). The EEOC is not limited, as the appellant appears to suggest, to that which might be relevant at trial. Rather, the EEOC is entitled to all that is relevant to the charge under investigation. *EEOC v. Shell Oil Co.*, 52 U.S.L.W. 4399, 4402 (April 2, 1984). In *EEOC v. Shell Oil Co.*, the Supreme Court of the United States rejected the proposition that a district court must find the charge of discrimination to be well-founded, verifiable, or based on reasonable suspicion before enforcing an EEOC subpoena. *EEOC v. Shell Oil Co.*, 52 U.S.L.W. at 4404 n.26 & 4405 n.33. The Court explained:

> The district court has a responsibility to satisfy itself that the charge is valid and that the material requested is "relevant" to the charge [citation

> omitted] and more generally to assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose. [citations omitted] However, any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error.

Id. at 4404 n.26.

The concept of relevancy is construed broadly when a charge is in the investigatory stage. *EEOC v. University of Pittsburgh*, 643 F.2d 983, 986 (3d Cir.), *cert. denied*, 454 U.S. 880 (1981). The Supreme Court of the United States, in discussing the application of the relevance standard to a Title VII subpoena, noted Congress' apparent endorsement of an interpretation of the relevance standard which affords the EEOC access "to virtually any material that might cast light on the allegations against the employer."

> Since the enactment of Title VII, courts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer. In 1972, Congress undoubtedly was aware of the manner in which the courts were construing the concept of "relevance" and implicitly endorsed it by leaving intact the statutory definition of the Commission's investigative authority. On the other hand, Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.

EEOC v. Shell Oil Co., 52 U.S.L.W. at 4403.

Clearly, an alleged perpetrator of discrimination cannot be allowed to pick and choose the evidence which may

be necessary for an agency investigation. There may be evidence of discriminatory intent *and* of pretext in the confidential notes and memorandum which the appellant seeks to protect. Likewise, confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears. *Accord Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1240-41 (7th Cir. 1985) (comparative evidence may be appropriate to rebut employer's proffered, nondiscriminatory explanation). Relative qualifications of those who teach in academic institutions are not amenable to objective comparison in charts. Instead, the peer review material itself must be investigated to determine whether the evaluations are based in discrimination and whether they are reflected in the tenure decision.[2]

We hasten to add in this regard that it is neither for the EEOC nor for the courts to reevaluate a candidate's qualifications. *Kunda*, 621 F.2d at 547-48 (cited with

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[2] Tenure decisions are not entitled to special treatment in Title VII actions merely because they are founded in part on subjective criteria, including the level of esteem in which a candidate is held by his colleagues and peers. Similar criteria must be considered in a Title VII review of any employment decision.

> The subjective esteem of colleagues and supervisors is often the key to any employment decision. Yet, especially in the blue-color context, the courts have not hesitated to review with great suspicion subjective judgments that adversely affect minorities. . . . Indeed, subjective esteem is more important in certain blue-colar contexts, where, for example, lives may depend on the employee's performance and good judgment. . . . And because all lawyers and judges are trained in academia, courts are better equipped to scrutinize academic decisionmaking than decisionmaking in the perhaps less familiar blue-colar context.

Namenwirth, 769 F.2d at 1244-45 (Swygert, J., dissenting) (citations omitted).

approval in *Hishon v. King & Spalding*, 52 U.S.L.W. 4627, 4630 n.4 (May 22, 1984) (Powell, J., concurring)). The scope of the EEOC's role is to determine whether or not there is evidence to support a charge that an employment decision was based upon reasons protected by federal statute. The oft times difficult decision to promote or to grant tenure shall be left exclusively to this nation's colleges and universities so long as the decisions are not made, in part large or small, upon statutorily impermissible reasons.

IV.

After careful review of the EEOC's subpoena requests with the appropriate relevance standard in mind, we find the EEOC's requests are relevant and not overbroad. The material pertaining to the Montbertrand tenure decision is clearly revelant to the investigation. The EEOC also asks for material on persons other than Montbertrand who were considered for tenure from November 7, 1977 to the date of the subpoena. Since Montbertrand was hired in 1977 and considered for tenure in 1980, the data requested on other candidates is part of an appropriate comparative base. We note parenthetically that the district court ordered, with EEOC's concurrence, that names and identifying data of the other professors would be omitted.

Consequently, since we find that the material sought in the subpoena duces tecum at issue is relevant to the EEOC's investigation, the district court's order will be affirmed.

ALDISERT, *Chief Judge*, dissenting.

What divides this panel is a philosophical difference in two separate, but in this case, related, broad concepts: the extent to which an EEOC administrative subpoena may cast an immense discovery net that compromises privacy expectations of innocent third parties without the EEOC being put to the most meager burden of asserting a factual justificatory predicate for its actions; and the extent, if any, to which an employment discrimination claim based on professional tenure denial in a four person Department of French in a small liberal arts college differs from a discrimination claim against a multinational corporation such as Shell Oil Company.

The majority believe that there is absolutely no difference between what may be obtained by an EEOC administrative subpoena when a claim for lifetime tenure and position is implicated in the context of a small liberal arts college or when made in the context of a typical commercial employer. Notwithstanding the wealth of materials already furnished the EEOC by the college relating to the Montbertrand's application for tenure, the majority would not place any burden whatsoever on the EEOC to show that it cannot intelligently evaluate the claim until it was in possession of case histories of every tenured position implicating confidential communications of innocent third parties. I reject both approaches because I abhore dogmatic application of the law. I reject slot machine justice, what Roscoe Pound called "Mechanical Jurisprudence," [1] because it has been my experience that in many cases everybody may be a bit right, that nobody is completely right or completely wrong, and that each case has its own pathology. Thus, automatic and unbridled EEOC subpoena searches cannot be the law; and if it is, I am reminded of Chamfort's aphorism: "It

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[1] Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

is easier to make certain things legal than to make them legitimate."

The claimant contends that he was discriminated against because he was a French native. The EEOC has been given virtually everything contained in claimant's personnel files. It seems to me that the administrative subpoena should not be enforced in its entirety unless the EEOC demonstrates compelling necessity for rooting through confidential files of other faculty members. Certainly, the doctrine of *res inter alios acta* is alive and kicking today, and I believe that before a federal agency should be allowed to poke through the confidential files of strangers to an employment discrimination claim, it should be held to some justificatory burden before a federal judge, rather than being annointed with a ukase to fish in any waters selected by it, and it alone.

We have federal courts to draw the line against arbitrary and capricious federal agency actions and this case cries out for preliminary judicial adjudication, instead of agency action gone wild. The facts presented here require that a district court exercise a highly refined discretion and be particularly sensitive to the valid interest of confidentiality in the tenure review process before ordering wholesale production of confidential documents of strangers to this proceeding at this very preliminary stage of an investigation. Because neither the district court nor the majority accord this sensitivity, I dissent. I would reverse the judgment of the district court.

I.

Several facts underlying this appeal are critical. Appellant Franklin and Marshall is a small liberal arts college with a student enrollment of 1,900. Montbertrand sought a tenured position in a French Department that consists of four persons. As is the norm in institutions of higher education, the decisional process in awarding

tenure involves not only the college administrative staff, but faculty as well. Initial tenure decisions are made by the Professional Standards Committee, all five members of which are elected by the faculty. This committee makes tenure recommendations to the Dean and President of the College. In Montbertrand's case, the committee—comprised of faculty members only—recommended that Montbertrand be denied tenure because of his deficiencies in scholarship and in participation in college governance activities. The College administration adopted this recommendation and the administrative and judicial proceedings leading to this appeal followed.

The majority assert that the College has refused to produce "the bulk of the material sought" by the EEOC. Maj. op. typescript at 6. This characterization is not fair. The College has provided or agreed to provide a considerable amount of data.[2] I believe the district court

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[2] This material includes:

1. Materials from Montbertrand's tenure file including:
   (a) Third and Second Year Reviews;
   (b) Letters to Montbertrand on the status of his tenure review; and
   (c) Documents of Montbertrand supporting his tenure application;
2. Compilation by the College of the national origin of tenure candidates from 1977 to 1981;
3. Untitled list of faculty members, country of birth, present citizenship, and citizenship at birth;
4. Evaluations of Montbertrand's writings from four outside professors identified by name and college or university;
5. Faculty merit evaluation forms for Montbertrand;
6. Correspondence relative to Montbertrand's tenure denial;
7. January 21, 1981, letter from College President to Montbertrand discussing the fact that deficiencies in scholarship and

should have analyzed this data carefully and on the basis of such Analysis, required the EEOC to show that it had established a sufficient factual and legal basis to warrant the serious intrusion into the College's tenure review process in other cases. At a very minimum, the district court should satisfy itself of the necessity to breach the wall of confidentiality obviously present on this small campus.

II.

Colleges and universities occupy a unique position in our society. They are not commercial employers; they are not government agencies. Perhaps more than any other institution, they embody and promote under the rubric of academic freedom our cherished values of free inquiry and robust debate on a variety of subjects. As the majority correctly observe, academic freedom has constitutional underpinnings. "[T]hough not a specifically enu-

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general contributions were not offset by governance performance in other areas;

8. Handbook of College;
9. Faculty Handbook 1978;
10. Inter-office Memo from Chairman of French and Italian Departments, Angela Jeannet, to Professional Standards Committee, January 1980, regarding Third Year review of Montbertrand. The Memo provides information on work performance, publications, grants, professional activities, participation in college and department activities, and evaluation recommending Montbertrand for tenure with attached reappointment of probationary faculty.
11. COTE form results (Student Evaluations of Teaching Effectiveness);
12. Grade surveys;
13. Enrollment data;
14. Recommendations of Professional Standards Committee in each tenure case; and
15. Actions taken by the President in each tenure case.

merated constitutional right, [academic freedom] long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., plurality opinion). The majority further note that "central to the determination of 'who may teach,' or who will receive tenure, has been the system of peer review by confidential evaluations and recommendations of tenured faculty." Maj. op. typescript at 10. Recognizing these crucial factors, the majority then analyze the legislative history of Title VII and conclude that this history somehow eradicates the importance of confidentiality in peer evaluations when the EEOC subpoenas documents generated in the tenure review process. The majority's analysis and application of legislative history to support the wholesale disclosure of all confidential materials simply proves too much.

The cited legislative history convincingly demonstrates that Congress intended Title VII to apply to universities and colleges. No one can argue to the contrary. The majority nonetheless rest their *ratio decidendi* entirely upon an analysis of the 1972 amendment to Title VII that eliminated the exemption for academic institutions. We are thus treated to a classic fallacy of irrelevance, or *ignoratio elenchi*. The error is made by attempting to prove something that has not been denied, to-wit that the 1972 amendment to Title VII took in institutions of higher learning. The question under consideration, however, is not whether Title VII was so amended but whether, on the strength of a mere conclusory allegation of discrimination, the EEOC is permitted the kind of intrusion into the tenure review process it seeks here. I find no support in the legislative history for the proposition that Congress foresaw the possibility, much less intended, that a college instructor may, with a blunderbuss allegation of discriminatory treatment against Frenchmen, devoid of factual specificity, gain unfettered access to the confidential personnel files of all his colleagues. The troublesome and

recurring problem of statutory voids was recognized many decades ago by John Chipman Gray:

> The fact is that the difficulties of so-called interpretation arise when the legislation has no meaning at all; when the question which is raised in the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.[3]

At bottom always is the task of divining the intention of the legislature. Learned Hand has observed:

> When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right. . . . Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves.[4]

Such an approach requires us to decide if Congress in fact intended a massive, uncontrolled intrusion into the rights of privacy and confidentiality implicated in the tenure review process of innocent third parties. I do not think so. I believe that the congressional intent to eliminate employment discrimination can be fully served without conferring on the EEOC such absolute and unyielding investigatory powers to embark upon a fishing expedition into confidential materials. Discovery expeditions into records of commerce and industry implicate only money and time; they do not implicate confidential evaluations

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[3] J. C. Gray, *Nature and Sources of Law* 172-73 (2d ed. 1921).

[4] L. Hand, The Spirit of Liberty 100, 109-110 (2d ed. 1954).

of professional performance uttered by intimate peers with the expectation of privacy.

III.

I do not agree with the majority's assumption that academic institutions are the same as any other employer. At least insofar as their administrative and governance structures are concerned, colleges and universities differ significantly from garden variety private employers.[5] In the context of application of the provisions of the National Labor Relations Act the Supreme Court has counseled that "principles developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'" *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1979) (citation omitted). The unique characteristics of the tenure review process led the court in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983), to recognize a qualified academic review privilege. In *Notre Dame*, the court stated:

> It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that

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[5] [A]uthority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. . . . This system of "shared authority" evolved from the medieval model of collegial decision-making in which guilds of scholars were responsible only to themselves. . . . At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times. . . . traditions of collegiality continue to play a significant role at many universities . . . .

NLRB v. Yeshiva University, 444 U.S. 672, 680 (1979).

faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications. *See Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977). Moreover, it is evident that confidentiality is absolutely essential to the proper functioning of the faculty tenure review process. The tenure review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough in order that the University might grant tenure only to the most qualified candidates based on merit and ability to work effectively with colleagues, students, and the administration. For these reasons, academicians who are selected to evaluate their peers for tenure have, since the inception of the academic tenure concept, been assurred that their critiques and discussions will remain confidential. Without this assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future.

Id. at 336.

IV.

In a subpoena enforcement proceeding the court should abjure rote application of dogma against a small college. Rather it should engage in a balancing analysis that will accord sufficient weight to the valid and competing interests at issue. The court must avoid slavish allegiance to conceptual jurisprudence, the now-discredited *Begriffsjurisprudenz*, the target of our great masters, Holmes, Pound, and Cardozo; rather, the court should always consider the decision's consequence upon the social order. The judiciary has an obligation to accommodate, whenever possible, competing interests without adopting a "zero sum" decisional structure that permits the reckless advancement of one interest irrespective of destruction wreaked upon other salutory competing interests. Yet the majority refuse to undertake this balancing analysis, opting instead to assert that somehow the legislative history of Title VII compels intrusion into the peer review system in every tenure decision made by the institution. At this time, it is not necessary for me to reach the question whether there is an academic review privilege, *see EEOC v. University of Notre Dame Du lac*, 715 F.2d 331 (7th Cir. 1983). In this case, I am completely comfortable with the approach adopted in *Gray v. Board of Higher Education*, 692 F.2d 901, 903 (2d Cir. 1982), in a discovery context:

> Any finding that information is protected from discovery must reflect a balancing between, on the one hand, the parties' right to discovery, which stems from society's interest in a full and fair adjudication of the issues involved in litigation and, on the other hand, the existence of a societal interest in protecting the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value.

Extended logically, the majority's absolutist approach elevates the ethereal factor of relevancy as the only restraint on the EEOC subpoena process. At the administrative subpoena level there is absolutely no limitation to what is or is not relevant. There is no complaint filed in the district court, no factual averments of "a short and plain statement of the claim," as required by Rule 8, Federal Rules of Civil Procedure, no stated boundaries to the allegation of discrimination. To accept the majority's formulation is to indulge in a classic Catch-22: "In discovery we have the right to examine anything that is relevant, but we can't tell what is relevant until we finish our discovery." Because of the danger of harm created by the rupture of confidentiality, we cannot lend jurisprudential dignity to Tweedledee's soliloquy. "If it was so, it might be; and if it were so, it would be; but as it isn't, it ain't. That's logic." [6]

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[6] L. Carroll, Through the Looking Glass, Chap. 4.

V.

I now turn to the various subpoena requests. I agree that Montbertrand's tenure review files should be produced with the names and other identifying criteria redacted. But records and documents pertaining to other faculty members, who were granted or denied tenure since November 7, 1977, implicate compelling confidentiality interests of strangers to these proceedings. Requests for these materials must first be evaluated by the district court in light of the considerable data already provided to the EEOC by Franklin and Marshall and by the data contained in Montbertrand's tenure file. Unless these documents disclose some modicum of substance to Montbertrand's claim of national origin discrimination, and some indication that these additional materials will prove the claim, we should not permit the serious violation of other faculty members' confidentiality that production of records will entail. Because the district court did not engage in this analysis, I would remand for appropriate findings.

To be sure, the EEOC is not required to establish a prima facie case in behalf of Montbertrand as a prerequisite to compelled production of documents. The majority properly cite *EEOC v. Shell Oil Co.*, —— U.S. —— (52 U.S.L.W. 4399, April 2, 1984), for the proposition that in a subpoena enforcement proceeding the EEOC need not establish that the charge is "well founded, verifiable, or based on reasonable suspicion." But the question here is not the *quality* of the factual predicate underlying the claim, but it is whether *any* factual predicate whatsoever is present to merit the assault on the confidential files of innocent strangers to this proceeding.

What I propose, congruent with the Second Circuit's approach in *Gray*, is a flexible, case by case approach that puts a modest burden on the EEOC whenever its request impinges upon "the confidentiality of certain disclosures made within the context of certain relationships of acknowledged social value." *Gray*, 692 F.2d at 903. At a minimum, based on materials already discussed such as in this case, the EEOC should be required to set forth a justificatory factual predicate for the confidentiality or privacy intrusions instead of naked conclusory allegations. Where, as here, confidentiality expectations of strangers are implicated, the subpoena should not, without court approval, be used as a tool in search of that predicate at the expense of privacy rights of innocent parties and of the integrity of the tenure review process.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

vs.

FRANKLIN AND MARSHALL COLLEGE,
Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Hunter and Garth would grant the petition for rehearing. Judge Adams dissents and files a separate Statement Sur Denial of Petition for Rehearing.

By the Court,

/s/ Carol Los Mansmann
Circuit Judge

Dated: November 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1739

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee

v.

FRANKLIN AND MARSHALL COLLEGE,
Appellant

STATEMENT SUR DENIAL OF
PETITION FOR REHEARING

Present: ADAMS, *Acting Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges.*

I would grant rehearing in banc because of the significant First Amendment implications this case holds for our colleges and universities as well as the division among the circuit courts of appeals. Federal court review of university decisions carries serious consequences for academic freedom. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); *Galda v. Rutgers*, No. 84-5498 (slip op.) (3d Cir., August 28, 1985) (Adams, J., dissenting). The tenure decision at issue here reduces in essence to the faculty's determination of who may teach, one of what Justice Frankfurter refererd to as "'the four essential freedoms of a university.'" *Sweezy*, 354 U.S. at 263. Yet the discovery order upheld by the panel allows for a broad sweep of files revealing the internal debate over tenure votes, without any demonstration of special need.

In recognition of the threat this may pose to unrestrained discussion within the academic community, two other circuit courts of appeals have fashioned contrasting approaches to that adopted by the panel here. Given this split in authority, and given the importance of the issue, I believe the matter merits the consideration of the entire court.

BY THE COURT,

/s/ [Illegible]
Acting Chief Judge

DATED: November 29, 1985

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Miscellaneous No. 84-0675

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant

—v—

FRANKLIN AND MARSHALL COLLEGE,
Respondent

[Filed Nov. 9, 1984]

ORDER

AND NOW, this — day of November, 1984, upon consideration of the petition of the applicant, the responses of the respondent, the arguments of counsel in open court, and the briefs of counsel, it is ORDERED that the respondent shall comply with the subpoena duces tecum issued by the applicant, and shall produce the information called for by the following paragraphs and sections of said subpoena:

¶¶ 1(e), (h), (j) and ¶¶ 2 and 3.

IT IS FURTHER ORDERED that the respondent may omit the names and identifying data of other professors in the said paragraphs and sections to which respondent is ordered to comply.

BY THE COURT:

/s/ [Illegible]

APPENDIX D

EXHIBIT "F"

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
PHILADELPHIA DISTRICT OFFICE
127 N. Fourth Street
Philadelphia, Pennsylvania 19106

Charge No. 031812566

Subpoena No. PA-83-029

IN THE MATTER OF:

GERARD MONTBERTRAND

v.

FRANKLIN & MARSHALL COLLEGE

To: George C. Werner, Esquire
Barley, Snyder, Cooper & Barber
115 East King Street
Lancaster, Pennsylvania 17602

DETERMINATION

The Respondent, Franklin & Marshall College (herein after "Petitioner") was served on July 15, 1983, with an Equal Employment Opportunity Commission Subpoena *duces tecum*, issued by the District Director of the Philadelphia District Office, Johnny J. Butler, on July 12, 1983,

pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-9, hereinafter "Title VII". Petitioner filed a timely Petition to Revoke or Modify the Subpoena. The Equal Employment Opportunity Commission (hereinafter the "Commission") has determined that the Petition does not support a revocation or modification of the Subpoena.

Subpoena No. PA-83-029

The Subpoena requests documents and information concerning the Charge of Discrimination filed by Gerard Montbertrand (hereinafter the "Charging Party") alleging national origin discrimination with regard to his tenure denial. In general, Subpoena No. PA-83-029 requests documents regarding information relied upon to reach a tenure decision with respect to the Charging Party, and whether the Charging Party has any status which would make him eligible to receive tenure. Furthermore, the Subpoena requests information as to the documentation relied upon by the Petitioner in making its decision with respect to other tenure candidates. The Commission needs the requested information in order to proceed with its investigation.

Subpoena Requests Not Affected by this Determination

The Petitioner has stated it will provide the Commission with some of the information requested in Subpoena No. PA-83-029. To the extent that the documents are produced, this Determination will not affect those areas not objected to by the Petitioner.

Petitioner has stated that it agrees to provide the Commission with the information asked for in Subpoena Request No. 1(b), relating to COTE form results, No. 1(c), relating to Grade Surveys and No. 1(d) relating to Enrollment Data. Because of the substantial number of documents involved, the Commission agrees to examine these documents at the offices of the Petitioner.

With respect to Subpoena Request No. 1(f), asking for Governance Evaluation Forms, Petitioner asserts that it does not maintain the requested information. Petitioner will agree to prepare descriptive information concerning its participation in governance for each candidate. The Commission agrees to accept the descriptive information.

Petitioner will partially comply with several requests in Subpoena No. PA-83-029 with respect to Subpoena Request No. 1(g), Petitioner will provide a list of Publications and similar scholarly activities for each candidate. With respct to Subpoena Requests Nos. 1(a), 1(e), 1(h) and 1(j), Petitioner will provide annual evaluation forms and the number of tenured department members "highly recommending" tenure, "recommending" tenure, and "not recommending" tenure in each case together with a disposition of the case and the reasons for the disposition of the Professional Standards Committee.

With respect to Subpoena Request No. 1(i), asking for information on academic advising, Petitioner claims that it does not maintain such information. If any such information exists, the Commission must be given access to it as it is relevant to the issues of job performance and "general contributions".

Petitioner Claims

Petitioner first claims that the Subpoena should be revoked because the Charging Party has failed to allege "any actionable discrimination".

The Petitioner incorrectly relies on a defense that may be argued only before the Court. Petitioner asserts that there is no discrimination because ". . . English language fluency is a permissible consideration as a reasonable, job related criteria of employment." The instant case is not in litigation, it is under investigation by the Commission. The appropriate principle to be applied is that the scope of a Commission investigation is broad. As the

Sixth Circuit held in *Equal Employment Opportunity Commission v. Cambridge Tile Mfg. Co.*, 590 F.2d 205 at 206 (6th Cir. 1979), ". . . the Commission has the power to investigate and thus subpoena documents concerning any employer practice which may shed light on the discrimination."

Second, Petitioner argues that the Commission should not be allowed to obtain the subpoened documents because it has been provided with a written statement of the reasons for the tenure decision. The reasons referred to by the Petitioner are quite general and are in no way responsive to the Subpoena. The letter merely states that tenure was not recommended because of ". . . deficiencies in the areas of scholarship and general contributions." These reasons do not explain what was missing in the Charging Party's "Scholarship" or lacking in his "general contributions" to the college community. In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the Court stated that ". . . a Plaintiff cannot be expected to disprove a Defendant's reasons unless they have been articulated with some specificity." Id. at 1011-1012, n.5.

Furthermore, Petitioner's assertion is contrary to the Commission's Procedural Rules and Regulations, 29 CFR § 1601.12(b) which states that "a charge is sufficient when the Commission receives from the person making the Charge a written statement sufficiently precise to identify the parties, and to describe generally, the action or practices complained of." An allegation which informs the Commission of the practice or violation to be investigated and notifies the Petitioner of what it is required to defend fulfills the requirements of Title VII. *Graniteville Company (Sibley Division) v. Equal Employment Opportunity Commission*, 412 F.2d 462 (5th Cir. 1969); *Circle K Corporation, Inc. v. Equal Employment Opportunity Commission*, 501 F.2d 1052 (10th Cir. 1972).

Viewed in light of the preceding cases, there can be no doubt that the charge submitted by the Charging Party

is sufficient to allow the Commission to pursue its investigation. The Charging Party alleges that he was denied tenure because his French accent was deemed by Petitioner to reduce his ability to effectively communicate in English, thereby in effect discriminating against him because of his national origin. Having received the charge, it is the responsibility of the Commission to conduct an investigation. There is no need to prove the case on the merits at this point.

With respect to Subpoena Request No. 1(k), which asks for the Recommendations of the Professional Standards Committee in each tenure case and Subpoena Request No. 1(l), which asks for the actions taken by the President in each tenure case, the Petitioner claims that the information has already been turned over to the Commission. The Petitioner has provided a list of the names of individuals granted or denied tenure, and a statement that the President accepted the recommendations of the Professional Standards Committee. To conduct a proper investigation, it is necessary for the Commission to have the specific details in each instance that tenure was granted or denied.

With respect to Subpoena Request No. 2, Petitioner claims it provided the Commission with "all information concerning the focus and extent of consideration of Montbertrand's English language competency in the tenure process and complete documentation of the amount of scholarly activity and participation in college governance by Montbertrand." This response to the Subpoena is nonresponsive since the request does not ask for this information.

Additionally, Petitioner claims that it has already provided the Commission with the minutes of the meetings asked for in Subpoena Request No. 2. The Commission has seen the minutes, but was denied the right to copy them. Specifically, Section 709(a), 42 U.S.C. § 2000e-8

(a), grants the Commission and its representatives ". . . access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title . . ."

Third, with respect to every other request made in Subpoena No. PA-83-029, the Petitioner objects on the basis of relevancy and the qualified academic peer review privilege.

The Petitioner's claims are without merit. The Commission is entitled to access to information relevant to a charge under investigation, § 709(a), 42 U.S.C. § 2000e-8(a), and to the production of information relevant to the charge under investigation, § 710, 42 U.S.C. § 2000e-9. It is the Commission, not the Petitioner that determines what information is relevant and within the scope of the charge. *Equal Employment Opportunity Commission v. University of New Mexico*, 504 F.2d 1296 (10th Cir. 1974).

Petitioner objects to the Subpoena Requests in No. 1(g) for evaluations by outside experts; No. 1(a) asking for Tenure Recommendations Forms; in No. 1(e) asking for the third year review; in No. 1(h) asking for letters of reference; in No. 1(j) asking for all notes, letters, memoranda or other documentation considered during the tenure cases; and No. 3 asking for the minutes of the Professional Standards Committee meetings when tenure decisions were made. In each instance the requested information is relevant and necessary in order that the Commission can determine what areas were considered in making tenure decisions and how the Charging Party compared with other candidates. In analyzing the requests for information, there can be no question that in Subpoena No. PA-83-029, the Commission seeks evidence which under well-established authority, is relevant and within the scope of the investigation of the Charge of

Discrimination. *See, Parliament House Motor Hotel v. Equal Employment Opportunity Commission*, 44 F.2d 1335, 1340 (5th Cir. 1971); and *Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission*, 418 F.2d 355 (6th Cir. 1969).

The Petitioner also claims that, even if relevant, the above mentioned information not made available is protected by the qualified academic peer review privilege. The Petitioner also claims that the information asked for in Subpoena Request No. 2 is protected by the privilege.

The Petitioner's claim is without merit. The Commission is properly proceeding with an investigation which is within its congressionally mandated authority. Under Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), the Commission is specifically authorized by statute to conduct investigations to determine if employers are committing unlawful employment practices in violation of Section 703 and 704 of Title VII, 42 U.S.C. § 2000c-2 and 3.

In this action the Charging Party alleges that his national origin was a factor in the decision of the Petitioner to deny him tenure. Therefore, the motivation of the members of the Committee who voted against him is a critical element of his claim. It is a generally accepted principle of law that where confidential information relates to a college's justification for a challenged decision, the Plaintiff's right to a fair opportunity to present his claim must prevail over any general principles of academic confidentiality. *In Re Dinnan*, 661 F.2d 246 (5th Cir. 1981); *Jepsen v. Florida Board of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980).

Petitioner relies on *Gray v. Board of Higher Education, City of New York*, 692 F.2d 901 (2nd Cir. 1980), to support its adoption of the qualified academic peer review privilege. In fact, the court in *Gray* ruled a college cannot use this Privilege to deny the Plaintiff the opportunity to

review the actions of the committee with respect to their decision to grant or deny tenure. At P. 906, the court stated that "[m]erely by furnishing the after-the-fact statement of reasons the Defendants cannot fill the void left by the committee's conclusory decision . . ." The Commission, as the agency empowered by Congress to investigate claims of employment discrimination, has a right to discover the reasons why the "scholarship and general contributions" of the Charging Party are deficient.

Determination

For all the above-stated reasons, it is my determination that the Petition to Revoke or Modify Subpoena No. PA-83-029 is denied. Therefore, in accordance with this Determination, you are directed to produce the documents on Tuesday, September 13, 1983 at 11:00 A.M.

/s/ Johnny J. Butler
JOHNNY J. BUTLER
District Director

DATE: 8/18/83